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17 IN THE UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

20 **ARTURO CHAIREZ,**

21 C 07-5767 MMC (PR)

22 Petitioner,

23 **v.**

24 **M. ADAMS, Warden,**

25 Respondent.

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27
28 **MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS ON GROUNDS**
OF UNTIMELINESS (28 U.S.C. § 2244(d)(1))

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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ARTURO CHAIREZ,

C 07-5767 MMC (PR)

Petitioner.

10

M. ADAMS. Warden.

**MOTION TO DISMISS PETITION
FOR WRIT OF HABEAS CORPUS
ON GROUNDS OF
UNTIMELINESS (28 U.S.C. §
2244(d)(1))**

Respondent.

Pursuant to this Court's Order of April 11, 2008, respondent respectfully files this motion requesting that this Court dismiss the Petition for Writ of Habeas Corpus because petitioner has failed to satisfy the one-year statute of limitations in 28 U.S.C. § 2244(d), and has failed to allege or prove any circumstances excusing conformance with that statute.

A motion to dismiss in lieu of an answer on the merits is proper where the petition is procedurally defective. *See White v. Lewis*, 874 F.2d 599, 602 (9th Cir. 1989), *O'Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990), rules governing 28 U.S.C. § 2244 cases, rule 4 and Advisory Committee Notes. We have not noticed a hearing date because petitioner is an incarcerated state prisoner who is representing himself in this case.

MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS ON GROUNDS OF UNTIMELINESS 28
U.S.C. § 2244(d)(1) - *Chairez v. Adams* - C 07-5767 MMC (PR)

PROCEDURAL HISTORY

On July 15, 2004, a second amended information was filed in Monterey County Superior Court accusing petitioner of lewd acts upon a child under Penal Code section 288(a)^{1/} (count 1, John Doe; counts 2-3, Jane Doe); and an attempted lewd act upon Jane Doe (count 4, §§ 664/288(a)). Infliction of great bodily injury under section 12022.7 was alleged as to count 1. Allegations were made under sections 667.61(a) and 667.61(b) as to counts 1-3. A prior prison term under section 667.5(b) was also alleged. CT 131.^{2/}

On July 15, 2004, petitioner was found guilty of counts 1 and 2, and not guilty of counts 3 and 4. Allegations under sections 667.61(a) and 667.61(b) were found true. CT 148, et seq.

On September 10, 2004, petitioner was sentenced 25 years to life on count 1, with a concurrent term of 15 years to life on count 2. CT 199.

2 On December 16, 2005, the California Court of Appeal filed its opinion affirming the
3 judgment. *See* Exh. C.

4 On or about January 25, 2006, petitioner filed his Petition for Review in the California
5 Supreme Court. *See* Exh. D. On March 1, 2006, that court denied the Petition for Review. *See* Exh.
6 E. Proceedings in this Court followed.

ARGUMENT

THE PETITION IS UNTIMELY

The petition in this case is, on its face, untimely. Petitioner advances no reason why this untimeliness should be excused. Accordingly, this Court should dismiss the petition.

22 As we stated in the procedural history, the California Supreme Court denied the Petition

24 1. All code citations are to the California Penal Code unless otherwise noted.

25 2. Citations to “CT” are to the Clerk’s Transcript in the California Court of Appeal.

26 Citations to “RT” are to the Reporter’s Transcript in that court. Because we believe there are no
27 serious disputes as to the procedural or factual history of this case at this time, we have not included
28 the clerk’s or reporter’s transcripts with this filing. We will, of course, forward those documents
 to this Court should it so request.

1 for Review in this case on March 1, 2006. According to settled case law, the case was final, and
2 petitioner's one-year statute of limitations under 28 U.S.C. § 2244(d) began running, 90 days later,
3 on May 30, 2006, when the time to file a petition for writ of certiorari expires. *See Bowen v. Roe*,
4 188 F.3d 1157 (9th Cir. 1999)

5 Petitioner filed his petition in this case on November 14, 2007. That petition was filed six
6 months after the expiration of the one-year statute of limitations, on May 30, 2007.

7 It is true that petitioner did file a pleading in this Court after the denial of the Petition for
8 Review in the California Supreme Court. However, that filing did not toll the statute. *Duncan v.*
9 *Walker*, 533 U.S. 167, 181-82 (2001). Nor did that filing even constitute a petition. *See Woodford*
10 *v. Garceau*, 538 U.S. 202 (2003). In case No. 07-2643, petitioner filed a motion for extension of
11 time to file habeas corpus petition, see docket No. 1 in that case. This Court has twice ruled that that
12 pleading did not form a Petition for Writ of Habeas Corpus. In docket No. 4 of 07-2643, this Court
13 stated that it could not "discern from the instant filing whether petitioner can meet even the most
14 basic requirements for proceeding with a habeas petition in federal court Consequently, the
15 motion will not be construed as a habeas petition." Again, in docket No. 6 of 07-2643, this Court
16 repeated that it had "declined to construe the motion as a Petition for Writ of Habeas Corpus,
17 because petitioner had not alleged any grounds for habeas relief, and it was clear that he was not
18 asking for relief from his conviction but, rather, from the statute of limitations." Accordingly,
19 nothing petitioner filed in 07-2643 had any effect on the running of the statute of limitations in this
20 case. The first significant filing with respect to the statute of limitations was the filing of the
21 Petition for Writ of Habeas Corpus in this Case, 07-5767, which occurred on November 14, 2007.
22 Plainly, that petition was filed more than six months after the expiration of the applicable statute of
23 limitations. Petitioner has stated no reason why he should be excused or forgiven from the
24 requirements of that statute. Accordingly, the current petition is untimely, and should be dismissed.

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MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS ON GROUNDS OF UNTIMELINESS 28
U.S.C. § 2244(d)(1) - *Chairez v. Adams* - C 07-5767 MMC (PR)

1 WHEREFORE, for the reasons stated, respondent respectfully requests the Petition be
2 dismissed with prejudice on grounds of untimeliness, and all relief be denied.

3 Dated: July 9, 2008

4 Respectfully submitted,

5 EDMUND G. BROWN JR.
6 Attorney General of the State of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Arturo Chairez v. M. Adams, Warden**

No.:C 07-5767 MMC (PR)

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **July 10, 2008**, I served the attached **(1) MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS ON GROUNDS OF UNTIMELINESS (28 U.S.C. § 2244(d)(1)), (2) NOTICE OF LODGING AND INDEX OF EXHIBITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Arturo Chairez
V-55603
Corcoran State Prison
P. O. Box 3471
Corcoran, CA 93212

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 10, 2008**, at San Francisco, California.

Gloria J. Milina

Declarant

/s/ Gloria Milina

Signature